SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1329

ELI GURMAN,

Petitioner,

vs.

FREDERICK ILLG, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the Supreme Court of Errors of the State of Connecticut, which disposed of this and a companion case, has not yet been officially reported. It is printed in the record (R. 22).

II

Jurisdiction

(1) The jurisdiction of this Court is invoked under Title 28, U. S. C. A. Section 344 (b) The specific claims as to the jurisdiction of this Court are set out in the ac-

companying petition under the heading "B" and in the interest of brevity they are not repeated here.

(2) The judgment of the Supreme Court of Errors of the State of Connecticut sought to be reviewed was rendered on May 2, 1945 (R. 28).

(3) This judgment affirms the judgment of the Court of Common Pleas for the County of New Haven (R. 11) in favor of the respondent (plaintiff below) and against the petitioner (defendant below).

III

Statement of the Case

The essential facts of the case are given under the heading "A" in the accompanying petition and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows:

IV

Specification of Errors

It is respectfully submitted that the Supreme Court of Errors of the State of Connecticut erred in finding and holding

1. That under Section 205(e) of the Emergency Price Control Act of 1942 an overcharge in the weekly rental of a room for 38 weeks under an agreement running indefinitely from week to week constituted 38 separate violations, creating liability for damages in the amount of 38 times $50, viz. $1900.00.

2. In finding and holding that a construction of the Emergency Price Control Act of 1942, which results in an award

of $1900 for overcharges totaling only $38 in a continuous transaction does not violate the fifth and eighth amendments to the Constitution of the United States.

3. In holding that the plaintiff can recover in one action 38 times $50, instead of limiting recovery in "an action" to a single award of $50 or treble the overcharge, whichever is greater.

4. That the amendment of June 30, 1944, did not apply.

V

Summary of Argument

We develop the argument under the following heads:

A

The "commodity" sold in this case was the right to the occupancy of a room in a rooming house. The fact that the consideration was paid in weekly installments did not transform one selling into many sellings.

B

The award of so large a sum for so small an injury constitutes the taking of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States and the imposition of an excessive fine in violation of the Eighth Amendment. If the Supreme Court of Errors has correctly construed the Emergency Price Control Act of 1942, then the Act, to that extent and under these circumstances, is unconstitutional.

C

Section 205(e) of the Emergency Price Control Act of 1942 provides for the bringing of "an action" for $50 or treble the amount of the overcharge, whichever is greater.

Whatever may be the result when separate actions are brought for separate violations, the award in one action must be limited to a single award of $50 or to treble the overcharge, whichever is greater.

VI

One Continuous Violation, Not Thirty-eight Separate Violations

The "commodity" sold in this case was the right to the occupancy of a room in a rooming house. The fact that the consideration was paid in weekly installments did not transform one selling into many sellings.

The Object of the Fifty Dollar Provision.

The reason for the $50 provision is obvious. As most of the infractions would involve only very small amounts, the fifty dollar provision was included to secure energetic action. It could never have been intended as a means of substantial unjust enrichment. The amounts had to be comparatively small to avoid an unconstitutional taking of one man's property for another. The reasons and limitations in such legislation are admirably stated in *Fisher* v. *N. Y. C. & H. R. R.*, 46 N. Y. 644, 647.

Meaning of the Phrase, "Payment or Receipt of Rent."

In an earlier decision the court below had dealt with a somewhat different situation. (*Lapinski* v. *Copacino*, 131 Conn. 119.) In that case there was a rental under a so-called month-to-month tenancy at so much per month (p. 129). As to this tenancy the court said that "by our law under such tenancy each month's occupancy constitutes a separate leasing. General Statutes § 5021," (p. 131).

In such a tenancy, as the period is fixed, there is what is technically an estate for years, the word "years" simply

denoting a fixed period which may be "ever so short or long." *1 Revision of Swift's Digest,* side page 87.

By the early common law, which was also the early law of Connecticut, there were three estates less than free hold: estates for years; estates by sufferance; and estates at will. *1 Revision of Swift's Digest,* side pages 87-92.

What was known as an estate from year to year was an outgrowth by judicial construction of the estate at will. *4 Kent's Commentaries,* side page 112.

"It might be implied from the occupancy by one of the land of another, and the payment and acceptance of rent yearly or at aliquot parts of a year * * *" *Robinson's Elementary Law,* Sec. 96, p. 56.

If, therefore, the occupancy in the case at bar were an estate at all—instead of, as it was, a mere occupancy under a license—it would be an estate from year to year, a continuous thing, and not a series of independent estates as in *Lapinski* v. *Copacino,* 131 Conn. 119.

It is not material whether this case involves a new error or repeats the error of the earlier case, for the solution is to be found in the intent of the Congress expressed in the Act and not in any peculiarity of Connecticut law. The Emergency Price Control Act of 1942 certainly does not show *"an intention to permit its meaning to be varied by state law." Estate of Putnam* v. *Commissioner of Internal Revenue,* 89 L. Ed. (U. S.) Adv. Ops. 734, 735 (decided March 26, 1945).

In legislation of this kind just as in the Federal revenue laws "Congress establishes its own criteria * * *. Exemption from the Federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York according to the differing views of the state courts" *Lyeth* v. *Hoey,* 305 U. S. 188, 194.

Surely it was not the intent of the Congress to express the idea that the "payment or receipt of rent" indicates the physical handing over of the money. If, for instance, in the case of an apartment rented for thirty dollars a month, when the tenant goes to work in the morning he hands the landlord fifty cents, and when he comes back from work hands him fifty cents more, and so on through the month, it could not be said that there had been sixty payments, or that the unfortunate landlord was to be mulcted in the sum of three thousand dollars for one month, or thirty-six thousand dollars for a year.

What must be the real meaning of the payment and receipt is stated with wonderful clarity in *McCowen* v. *Dumont*, 54 Fed. Supp. 749, 751, as follows:

> "When the 'commodity' is the right to occupy a given habitation, the 'selling' of the commodity would seem to be the agreement whereby the right to occupancy is given. The fact that the consideration is to be paid in installments, or weekly, or monthly, logically would not transform one selling into many sellings."

It will be noted that the only authority under the federal law for including rentals at all is as one form of selling a commodity.

What Might Happen Under the Rule Adopted Below.

There can be no difference in principle between a period of a week and one of a day. Suppose a rooming house or hotel charges $2.25 a day when it should charge $2. The overcharge for the year would amount to $91.25. The recovery would be $18,250.

If a great hotel, say of 3,000 rooms, makes a specialty of permanent occupancies and even 100 rooms are continuously occupied by the same people, we have the neat sum which might have to be paid of $1,825,000. It might

well be, however, that one-third of the rooms, or 1,000 in all, will be likewise occupied. This would make the recovery $18,250,000. If all were likewise occupied we reach $54,750,000.

Rooms are often taken for a part of the twenty-four hours, to dress in, for conferences, or the like. In these times of shortage of housing accommodations the flop house flourishes, and it is quite possible to have three different people occupying the one room consecutively. It is not an unnatural arrangement, therefore, to have rooms rented not by the day but by the hour.

If you assume that, we reach in the case of the hotel last referred to, the modest figure of over a billion dollars.

A decent respect for the sanity of the Congress must lead us to some construction consistent with elementary justice and common sense.

These Results Not All Fanciful.

Cases calling for judgments of a billion dollars are not likely to be presented.

Situations are, however, likely to arise where the discrepancies are not only as striking as those in the cases at bar, but even much more so.

In *Peters* v. *Felber,* 152 Pac. (2d) 42, 44, an intermediate appellate court of California drawing upon its own actual experience uses this language:

> "This is not a fanciful speculation. We have one appeal pending before us where a multiple of fifty dollar penalties is sought because of a succession of weekly rents which exceeded the ceiling price by twenty-five cents each. In another action now on appeal the plaintiff pleads twenty-two purchases in which he was overcharged a total of thirty-four cents and prays for twenty-two fifty dollar penalties—a total of $1,100.
>
> "To interpret the section so as to hold out so great rewards for so minor overcharges would serve to foster

> in buyers a desire to promote price violations rather than to put a stop to them, with the result that the section would operate to defeat rather than further its purpose."

In *Ward* v. *Bochino,* 181 Misc. 355 46 N. Y. Supp (2d) 54, 58, a New York Supreme Court Case, there was a weekly overcharge of fifty cents for thirty-one weeks—$15.50 in all. The court in setting aside a directed verdict of $1,550 notes that the plaintiff by waiting for the whole year might have sued for $2,600, and adds, if it were a daily rental, then the penalty could be fifty times $365, of $18,250 for one year."

A Construction which Leads to Absurd Results Cannot Be Sound.

A law so drastic and savage as this should certainly not be extended in favor of one seeking to get an unearned increment. In this connection it must be remembered that the terms of the law are general and apply regardless of blame or lack of blame. *Bowles* v. *Amer. Stores,* 139, Fed. (2) 377.

This was expressed by the Chief Justice in *Haggar Co.* v. *Helverton,* 308 U. S. 389, 394; 84 Law Ed. 340, 344, as follows:

> "A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purposes."

VII

The Construction Adopted Below Makes a Part of the Act Unconstitutional

The award of so large a sum for so small an injury constitutes the taking of property without just compensation in violation of the Fifth Amendment to the Constitution of

the United States and the imposition of an excessive fine in violation of the Eighth Amendment. If the Supreme Court of Errors has correctly construed the Emergency Price Control Act of 1942, then the Act, to that extent and under these circumstances, is unconstitutional.

The question of constitutionality is important in three ways.

First—If a certain construction would lead to unconstitutional results that is a convincing argument against such construction.

Second. The Act or a part of it may be unconstitutional and void.

Third. There may be an unconstitutional application of the Act, as, for instance, where it is made the instrument of extortion.

Where one man's property is taken away from him without due process of law or an excessive fine and penalty imposed, there is a violation of the Constitution of the United States, particularly of the 5th and the 8th amendments. *16 Corpus Juris Secundum,* pp. 643 U. S. C. A. Constitution 5th Am. p. 182, note 15.

Certainly an Act which said that if a man did not meet a $100 note the payee could recover $100,000 could not stand, and the construction adopted below is just as drastic as that would be.

These judgments are out of all proportion, not only to the overcharges, but also to the requirements of an effective prosecution of the litigation. They constitute in this particular case a taking of property without due process of law.

This is a civil suit for damages for the benefit of an individual and criminal cases upholding large fines, particularly against corporations, are not in point. This Act has none of the safeguards which exist in the criminal law. We

do not have here the discretion in prosecuting authorities and trial judges to make the penalty fit the crime. The Congress may well provide wide limits for offenses which may be great or small. It can hardly have intended an inflexible maximum applicable to all alike. All of this shows that the Act was misconstrued by the Court.

VIII

Only One Penalty in One Action

Section 205(e) of the Emergency Price Control Act of 1942 provides for the bringing of "an action" for $50 or treble the amount of the overcharge, whichever is greater. Whatever may be the result when separate actions are brought for separate violations, the award in one action must be limited to a single award of $50 or to treble the overcharge, whichever is greater.

The statute, as noted, provided that if there was an overcharge the person paying the money "may bring an action" either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price.

It will be observed that it refers to the bringing of an "action for $50 * * *" and says nothing of a part of an action or a cause of action within an action.

IX

Conflict of Authority

The opinion below (R. 27) cites cases reaching the same result. Other courts agree with the position we take. *Peters* v. *Felber*, 152 Pac. (2d) p. 42 a California case; *Gordon* v. *Hochberg*, 49 N. Y. Supp. (2d) 957, 182 Misc. 117, a case in the appellate term of the New York Supreme Court; *Aronwald* v. *Sperber*, 49 N. Y. Supp. (2nd) 257 (merchandise); *Ward* v. *Bochino*, 46 N. Y. Supp. (2d) 54, 57, 181 Misc. 355, 50 N. Y. Supp. (2nd) 336 (App. Div.);

Link v. *Kallaos*, 56 Fed. Supp. 304; *Everly* v. *Zepp*, 57 Fed. Supp. 303; *Simmons* v. *Charbonier*, 56 Fed. Supp. 512, and particularly *McCowen* v. *Dumont*, 54 Fed. Supp. 749.

The law should operate uniformly throughout the country. Only this Court can resolve the conflict and point the way for all to follow.

X

The 1944 Amendment

On June 30, 1944, the Stabilization Extension Act of 1944 (Public Law No. 383, 78th Congress, Second Session, Chap. 325) became effective. The court did not apply it to this case, although it was pending on June 30, 1944.

Conclusion

The amendment contained in the Stabilization Extension Act of 1944, c325, Title I, Sec. 108, 58 Stat. 640, did not become effective until June 30, 1944. There must be a vast number of cases, both those now pending and those which may hereafter be brought under the law in its original form. The courts of various states and the lower Federal Courts have divided sharply on the questions presented in this case.

Even if this were the only case, the greatly disproportionate penalty imposed upon the petitioner amply justifies his resort to this Court to correct a grievous error in the construction and application of an Act of the Congress.

We respectfully submit that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOTE: The companion case in the Supreme Court of Errors decided with the same opinion (R. 22) is being held by the Court below to await the decision of this case, as appears from the following memorandum:

"ROBERT E. KINIRY

vs.

ELI GURMAN

State of Connecticut, New Haven County

Supreme Court of Errors, May 17, 1945

Memorandum In re Motion to Reargue

Per CURIAM:

In view of the fact that counsel for the defendant, also the defendant in the companion case of *Walsh v. Gurman*, propose to apply for a writ of certiorari to the Supreme Court of the United States in that case, action upon this motion will be deferred until the final determination of that application, and, if it is granted, until the final determination of the case of *Walsh v. Gurman* in the Supreme Court of the United States.

Certified:

MALTBIE,

Chief Justice."